In a pivotal antitrust decision, Judge Ellen Huvelle of the US District Court for the District of Columbia has allowed Sprint and Cellular South to pursue their suits to enjoin AT&T's proposed acquisition of T-Mobile. These suits pose a significant barrier to the merger of AT&T and T-Mobile. The ability of Sprint and Cellular South to pursue their claims represents a modest but important victory against the domination of the American wireless industry by an emerging AT&T/Verizon duopoly.
Sprint and Cellular South's lawsuits complement the US government's suit to block the AT&T/T-Mobile merger. The Department of Justice's complaint emphasizes the traditional elements of a claim arising under Section 7 of the Clayton Antitrust Act of 1914. The government's case against the proposed union of the second and fourth largest wireless carriers in the US draws heavily from the familiar arsenal of antitrust weapons against anticompetitive mergers. According to the Herfindahl-Hirschman Index, the standard measure of industrial concentration, AT&T and T-Mobile would command the single largest share of the US wireless market and an overwhelming share in many metropolitan markets. AT&T's acquisition of T-Mobile would eliminate potential competition and foreclose future entry by one of the country's peskiest and most creative wireless carriers.

In many merger cases, the contribution of antitrust law begins and ends in the US Department of Justice. No matter how substantially a proposed merger may lessen competition or tend to create a monopoly, competitors of the combining firms face formidable barriers that often prevent them from suing under Section 4 or Section 16 of the Clayton Act. The antitrust injury doctrine requires competitors to prove that they have not merely sustained some economic loss, but have suffered injury of the sort that the antitrust laws were intended to prevent. The need to show antitrust injury sometimes forces competitors to allege that the merged firm would engage in predatory pricing, a theory of antitrust liability that can be difficult to prove. Two recent Supreme Court decisions, Bell Atlantic v. Twombly and Verizon Communications v. Trinko, raise additional obstacles to antitrust plaintiffs, especially in suits alleging anticompetitive conduct in the telecommunications industry. Twombly requires plaintiffs to plead facts with sufficient particularity so that a court can find it plausible, and not merely imaginable, that defendants violated the antitrust laws. Trinko holds that violations of the Telecommunications Act of 1996, strictly of their own force, do not constitute antitrust violations. Plaintiffs must prove conduct that offends the antitrust laws, independent of their lawfulness under the Telecommunications Act or the implementing regulations of the Federal Communications Commission (FCC).

The magnitude of these barriers to suit heightens the importance of Judge Huvelle's decision to allow Sprint and Cellular South to pursue their suits against AT&T's proposed acquisition of T-Mobile. Any antitrust suit in which competitor-plaintiffs successfully deflect a Rule 12(b)(6) motion to dismiss represents a legally noteworthy development. An antitrust plaintiff that clears the Rule 12(b)(6) hurdle has shown antitrust injury and has satisfied both Twombly and Trinko. That plaintiff has pleaded facts that give rise to a plausible theory of antitrust liability beyond the violation of any applicable FCC regulations. That is exactly what happened in Sprint Nextel Corp v. AT&T Inc. and Cellular South, Inc.

v. AT&T Inc. To fully appreciate Judge Huvelle's decision in these cases, we must first understand the economic and technological terms by which American wireless carriers compete.

Sprint and Cellular South's involvement in the AT&T/T-Mobile merger is important precisely because this controversy is no ordinary story of industrial concentration. The proposed creation of America's largest wireless carrier has economic significance transcending its $39 billion price tag. The private suits against AT&T's bid for T-Mobile mark a significant step in the development of antitrust law, especially as applied to an industry as technologically intense as wireless communications. In three decades, the American wireless industry has come a very long way from its origins in first-generation (1G) wireless technology and the breakup of the Bell system. 2G wireless technology enabled the first wave of data transmission. Even more significantly, the expansion of the 2G spectrum gave American consumers something they had not enjoyed in either wireline or wireless communications: meaningful choice from a broader spectrum of carriers competing on price and on service. The third generation of wireless technology brought mixed blessings. What consumers gained through faster speeds and enhanced services, they lost to creeping concentration as the country's leading carriers, Verizon and AT&T, increased their shares of the market. Technological incompatibility between the leading 3G protocols has allowed Verizon and AT&T as duopolists to operate their own wireless ecosystems, insulated from fiercer levels of competition that could and should prevail in this industry.

Many American consumers now treat their wireless devices as their primary or even exclusive vehicle for voice communications. It is no longer enough to speak of phones or even of "smartphones" that bridge the conventional gap between voice and data. Americans transmit an astonishing volume of information over wireless networks. The most sophisticated wireless devices and applications designed for those devices give consumers all sorts of intelligent ways to enjoy, create, transform and share content. Wireless devices and networks have liberated consumers from the geographic constraints inherent in legacy wireline technology. Consumers expect ? and deserve ? the ability to travel with complete confidence that they can call and be called, that they can navigate the World Wide Web and manipulate applications and content, with no perceptible reduction in the level of service they enjoy at home.

Against this backdrop, we can understand the true significance of Sprint and Cellular South's suits against the AT&T/T-Mobile merger. Increased concentration in any industry tends to amplify the power of the largest firms ? especially a firm that would be created by a merger that has come under antitrust scrutiny ? to gouge consumers by raising prices and lowering the quality of the product or service provided. But a conventional application of antitrust injury doctrine holds that the ordinarily expected increase in price inflicts no anticompetitive harm on competitors, as distinct from consumers. For this reason, the concentration and market share data so central to the government's case would not be enough, standing alone, to enable Sprint and Cellular South to block the AT&T/T-Mobile merger.

Sprint and Cellular South successfully alleged that AT&T's acquisition of T-Mobile would impair competing wireless carriers' access to critical inputs. By far the most important input in the American wireless market, today and for the foreseeable future, is access to the best wireless devices. Postpaid wireless subscribers ? customers who subscribe to service for longer terms, as distinguished from pay-as-you-go prepaid customers ? are less sensitive to price than they are to the availability of the best, most technologically sophisticated devices. Unlike their counterparts in many other developed countries, American wireless subscribers almost invariably buy their devices from wireless carriers. American carriers regularly subsidize device purchases by their postpaid subscribers, in exchange for a long-term service commitment. Even when consumers buy devices at department stores or electronics boutiques, those vendors usually operate in cooperation with a wireless carrier and bundle the devices with service contracts by that carrier. Empowered by the bundling of devices with service subscriptions, the largest carriers in the US have progressively tightened their grip over the market for wireless devices. Apple's iconic iPhone and iPad epitomize the problem. For years, AT&T held an exclusive on the iPhone; no other carriers' customers could buy this sleekest and smartest of handheld devices. You can buy an iPad at an Apple store, but the market for data service plans to feed that iPad offers exactly two choices: AT&T or Verizon.

In allowing Sprint and Cellular South to pursue their Clayton Act claim against the AT&T/T-Mobile merger, Judge Huvelle astutely recognized the oligopsonistic potential of the merged firm to further constrict an already tight market for cutting-edge wireless devices. AT&T and Verizon, the country's largest wireless carriers, use their buying power to command exclusive access to devices such as the iPhone. At the very least, these large carriers demand (and receive) long periods of exclusivity at the beginning of the economically and technologically significant life of new devices. The addition of T-Mobile to AT&T would exacerbate a serious and legally objectionable constraint on the ability of Cellular South, other small carriers, and even a carrier as large as Sprint (the country's third largest) to offer devices on par with AT&T and Verizon. Permitting this merger would compound these competitors' most pressing problem: being consigned to an unappetizing selection of older phones at higher prices. Judge Huvelle correctly characterized the problem as one of "merger-to-monopsony." Creating the country's largest wireless carrier would cement AT&T's unlawful grip over the devices that are driving and will continue to drive competition among wireless companies.

A second input also played a significant role in these competitor suits. Roaming is the only way that a smaller carrier such as Cellular South, especially one with a geographically circumscribed network, can assure its customers of coast-to-coast coverage. Without commercially reasonable roaming agreements, a smaller carrier cannot serve subscribers who travel outside their home service areas. Judge Huvelle recognized the potential of a combined AT&T and T-Mobile to inflict anticompetitive injury on Corr Wireless, a Cellular South subsidiary that has met stiff resistance in its efforts to forge roaming agreements on commercially reasonable terms with these larger carriers. This conclusion, in

many respects, flows more naturally than the merger-to-monopsony theory by which Judge Huvelle recognized Sprint and Cellular South's allegations of injury in the device market. Antitrust cases more routinely involve anticompetitive conduct by defendants as sellers. Roaming agreements involve precisely that: would-be roaming partners sell access to each other's networks.

Judge Huvelle's decision did fall short in certain respects. She appears to have misunderstood the scope of competing carriers' need for roaming. 3G wireless technology is balkanized between Global System for Mobile Communications (GSM) and Code Division Multiple Access (CDMA) protocols. The incompatibility of GSM and CDMA technologies has forced carriers to choose between 3G protocols and to fashion their 3G roaming arrangements according to that choice. Sprint and Cellular South have operated 3G networks on the CDMA protocol. That choice has presumably led both of these carriers to seek 3G roaming agreements with Verizon, the country's leading CDMA carrier, as opposed to AT&T and T-Mobile, both of which have developed their 3G networks along the competing path of GSM technologies. Incompatibility in 3G networks, however, is of no moment when wireless carriers seek roaming on the Long-Term Evolution (LTE) protocol that represents the fourth generation of wireless technology. The proposed merger of AT&T and T-Mobile will enable this combined firm, to say nothing of Verizon, to obstruct 4G roaming in ways exceeding their existing refusal to cooperate with requests for roaming access to their legacy 3G networks.

On balance, however, Judge Huvelle's decision represents a very significant legal victory for competition in the American wireless industry. Preventing further concentration among wireless carriers preserves a competitive foothold by which Sprint, Cellular South, and other carriers can continue to offer consumers viable options beyond AT&T and Verizon. Nevertheless, domination of wireless communications by these two large carriers continues to pose serious economic threats. Notwithstanding their modest size, smaller carriers such as Cellular South have captured meaningful slices of the 700 megahertz "beachfront" spectrum that provides the best technological platform for deploying fully functional 4G/LTE networks. Properly managed, the transition between third- and fourth-generation wireless technologies promises to liberate American wireless communications, at long last, from the balkanization that has robbed 3G wireless of its full technological potential. The division between GSM and CDMA protocols has enabled AT&T and Verizon to keep cultivating a cozy duopoly in which two and exactly two dominant wireless carriers can lock their respective subscribers inside insulated wireless ecosystems. A wireless duopoly means that carriers outside the AT&T and Verizon ecosystems will have no access to cutting-edge devices, to say nothing of roaming, and will consequently be marginalized to the point of commercial extinction. The impact on all layers of the wireless industry, from radio access network equipment, chips and consumer devices to operating systems, applications and content, would be nothing short of devastating. Competition and consumer choice in wireless communications depend on full inter-operability at all layers and evenhanded access to crucial inputs such as devices and roaming. Judge Huvelle's decision, though by no means the final battle in a war that has only begun, represents a significant victory for

competition and consumer welfare in the broader market for wireless equipment, services and content.